No. 80-1679

JUN 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SCOTTO, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The government opposes this petition in the numbered points 1, 2 and 4[1] of its Brief in Opposition (hereinafter "Brief") at 3, 7 and 9. The government's point 2 seems to us to merit no reply. We confine ourselves, therefore, to the government's points 1 and 4.

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[1] Points 3 and 5 deal with the petition in No. 80-1746.

The Government's Point 1

The government attributes to petitioner a position he does not take: "that RICO . . . is violated only if the acts of racketeering 'advance . . . the enterprise's affairs'," and "that the enterprise must be the beneficiary rather than the victim of the racketeering activity." Brief at 3, 4. The next three pages (4-6) of the government's brief are devoted to an attack on that straw man.[2]

Petitioner's position in both courts below and in this Court has been and is that "there must be an operational, functional nexus between the predicate acts and his participation in the conduct of the affairs of the union" and "that, to be convicted under RICO, 'you have to intend to conduct the enterprise directly or indirectly in an illegal manner'." Petition at 5.

The beneficiary-victim question is raised in the petition only as an illustration of the "rapidly proliferating

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[2] The government's threshold invocation of Fed. R. Crim. P. 30 as an impediment to a grant of certiorari because "petitioner did not seek an instruction based on his current theory of RICO" (Brief, p. 4), must, of course, fail because petitioner has no "current theory of RICO" different from the ones on which the government admits he based his requested jury instructions.

Equally invalid is the government's contention (Brief at 4 n.6) that the instruction actually given was adequate. In *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977), cited by the government, the Court, in upholding the sufficiency of an instruction in the language of a statute which gave the jury no specific criteria for determining causation, noted that it did so "[b]ecause the respondent did not submit a draft instruction on the causation issue to the trial judge . . . ." Here, as the government concedes (Brief at 4), petitioner requested, and was denied, an instruction on "the relation between the acts of racketeering and 'the operation or management of the enterprise'."

questions concerning the nature and degree of the required relation" between the acts and the enterprise. Without suggesting that RICO requires the enterprise to be advanced rather than victimized, the petition in one short paragraph at p. 15, points to the undeniable conflict in that regard between the decision below and the newly announced decision in *United States* v. *Webster*, 639 F.2d 174 (4th Cir. 1981). The petition then goes on, however, to argue that both *Webster* and *United States* v. *Nerone*, 563 F.2d 836, 851 (1977), *cert. denied*, 435 U.S. 951 (1978), as well as a district court decision in *United States* v. *Gibson*, 486 F. Supp. 1230, 1244 (S.D. Ohio 1980), were clearly in conflict with the court below in the instant case and with the official Department of Justice position, as stated in the United States Attorneys' Manual, in holding, as to the required acts-enterprise nexus, that *the acts must influence the enterprise*, not the other way around. Petition, pp. 16-17. That conflict is not addressed in the government's brief.[3]

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[3] When the instant petition was filed, a petition for rehearing was pending in the *Webster* case. The government now points out (Brief at 6 and Appendix) that rehearing has since been granted in *Webster*. What the government does not disclose is that its petition for rehearing in that case dealt with the court's construction of RICO as requiring *benefit to or advancement of* the affairs of the enterprise by the racketeering activities, a construction unnecessary to the position of petitioner in this case. Petitioner's position here is that he was entitled to an instruction that "you have to conduct the enterprise directly or indirectly in an unlawful manner" and that the trial judge clearly and flatly refused to give such an instruction. Petition at 5. We think the position taken by the government in *Webster* supports our position here, for, as the government there said:

> ". . . A careful reading of the legislative history of the RICO statute indicates that what Congress was attempting to proscribe was the infiltration and corruption of legitimate enterprises by or through racketeering activity. In the end then, the

The Government's Point 4

As to petitioner's argument that it was error to convict and cumulatively punish him not only for the RICO violation, but also for the predicate Taft-Hartley violations, the government begins with the grossly erroneous assertion that this argument is "unavailing on the facts of this case," because "even if petitioner's argument were accepted, his total sentence would be unchanged." Brief at 9.

The government itself points out (Brief at 2 n.3) that, although Scotto received concurrent prison sentences, he was fined $50,000 on the Taft-Hartley counts *cumulatively* to the RICO fine of $25,000. See also, Petition at 3 and 9. A merger of the Taft-Hartley convictions into the RICO convictions would thus make a $50,000 difference in the total sentence.

On the merits of the question petitioner has argued here (Petition at 22) that cumulative punishments are impermissible, as this Court said in *Whalen* v. *United States*, 445 U.S. 684, 692 (1980), "in the absence of a clear indication of contrary legislative intent," and that the court below cited no such clear indication. The government now purports to supply that deficiency by citing § 904(b) of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 947, 18 U.S.C. 1961 note. That provision, however, is simply irrelevant. It merely prevents repeals of other criminal statutes by implication. We do not contend that RICO repealed the statutes

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best measure of whether a legitimate business has been conducted 'through' a pattern of racketeering activity may be the functional test of whether it has in some sense been corrupted by that activity. This is what we believe the 'substantial nexus' standard really means." *United States* v. *Webster*, *supra*, Appellees' Petition for Rehearing, p. 6.

creating the predicate offenses. We merely contend that where the jury finds the accused guilty of both RICO and lesser included offenses, separate convictions and sentences cannot be imposed. Nothing in § 904(b) is to the contrary.

CONCLUSION

In light of the foregoing and for the reasons stated in the Petition, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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